PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

113 (1)

08-709 NOV 25 2008

No.

OFFICE OF THE CLERK
William K. Suter, Clerk

In the

Supreme Court of the United States

PATRICIA POLLAK WEISS,

Petitioner,

v.

THE ESTATE OF ARTHUR COURSHON,
ARTHUR H. COURSHON and JACK R. COURSHON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR A WRIT OF CERTIORARI

PATRICIA POLLAK WEISS
Counsel of Record
Post Office Box 751
Sag Harbor, New York 11963-0019
(631) 725-4486

QUESTIONS PRESENTED

Since January 1, 2006 Florida law expressly provides that a civil lawsuit cannot be dismissed for lack of prosecution unless an interested person or the court or its clerk first serves plaintiff with advance notice that no action has occurred, in order to alert the parties that the court shall dismiss the lawsuit for lack of prosecution unless some activity occurs within 60 days after the service of the notice. That rule also affords plaintiff an opportunity to file a written explanation showing good cause as to why plaintiff's case should not be dismissed if no such activity occurs. Fla. R. Civ. P. 1.420(e). Petitioner had a 2000 state case pending against a Respondent when he died in 2006. That case alleged claims that a Southern District of Florida federal judgment had been registered in New York in a grossly excessive amount and required correction.

The first question presented is whether the Due Process Clause, Amend. XIV, prohibits a *sua sponte* judicial dismissal for lack of prosecution when no interested party served such advance notice and the only "notice" provided by the court was an unsigned cryptic electronic posting on the Miami-Dade Clerk's wesbite ("10/25/07 FWOP NOTICE GENERATED 01/25/2008 9:00 A.M.") and the record demonstrates a complete lack of any sort of paper notice ever having been prepared, signed, served or mailed to Petitioner or to any party.

The second question presented is whether the Due Process Clause, Amend. XIV, precludes a finding that no good cause was shown before dismissal of the lawsuit because plaintiff (Petitioner) argued that she had satisfactorily explained that following the death of one of the defendants, his estate's personal representative had intentionally and deliberately failed to provide any "personal notice" to plaintiff (Petitioner) alerting her of the court and date by which to file a creditor's claim, despite this Court's opinion in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), which held that notice by publication alone transgressed the Due Process Clause whenever the address of a person who asserted a claim against the decedent is known to the decedent's representatives.

The third question presented is whether Florida's mid-level appellate court thwarted Petitioner's constitutional rights under the Due Process and Equal Protection Clauses by not fashioning an opinion worded in a manner that would have been capable of being reviewed by the Florida Supreme Court, which has had only very limited jurisdiction to review mid-level appellate opinions ever since its discretionary certiorari jurisdiction was eliminated by a Florida constitutional amendment in 1980.

LIST OF ALL PARTIES

The parties to the proceedings are:

Petitioner:
PATRICIA POLLAK WEISS

Respondents:
THE ESTATE OF ARTHUR COURSHON
ARTHUR H. COURSHON (original party, now deceased)
JACK R. COURSHON

There are no corporate parties.

TABLE OF CONTENTS

Questions Presented i

List of Parties iii

Table of Contents iv

Table of Cited Authorities vi

Table of Appendices viii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved.. 1

Statement of the Case 2

Reasons For Granting the Writ 14

I. The State Court Decision Below Establishes An Intolerable Precedent in the Balance of Powers, Meriting This Court's Judicial Scrutiny Because It Conflicts With This Court's Established Precedent Concerning The Due Process Clause's Requirements of "Notice and A Fair Opportunity To Be Heard", and Florida State Courts Must Follow the Rule of Law To Prevent Nationwide Harm Because What Happens in the Florida Courts Affects What Happens in New York And Elsewhere

II. Because of Florida's Constitutional Provisions Which Constrain All Discretionary Certiorari Jurisdiction, The Third District's Decision Condoning Mere "E-Notice by Abbreviation" Represents A Fundamental Unfairness That Conflicts With This Court's Prior Precedent and Transgresses Fundamental Rights..... 29

Conclusion 30

Appendices ..... end

ORDER OF MOTION TO DISMISS FOR LACK OF PROSECUTION dated January 25, 2008 and filed on January 28, 2008 ..... a-1

OPINION AND ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL, dated and filed August 27, 2008 ..... a-3

United States Constitution, Amendments V & XIV. a-9

Florida Rule of Civil Procedure 1.420(e)..... a-10

TABLE OF CITED AUTHORITIES

Boddie v. Connecticut, 401 U.S. 371,
91 S.Ct. 780, 28 L.Ed.2d 113 (1971) 16

Continental National Bank v. Brill,
636 So.2d 782 (Fla.3d DCA 1994) 27

Continental National Bank v. Brill,
638 So.2d 1056 (Fla. 3DCA 1994) 27

Cox v. Wiod, Inc., 764 So.2d 671 (Fla.4th DCA 2000)..
19,24

Estate of Pope v. Tulsa Professional Collection
Services, Inc., 808 P.2d 640 (Okl. 1990)..... 8

In Re: Estate of Arthur H. Courshon #06-3669 (CP)
(02)..... passim

Insua v. Chantres,
665 So.2d 288 (Fla. 3rd DCA 1995)...9, 19, 24, 25

Macia v. Macia, 670 So.2d 190 (Fla. 3d DCA 1996)... 12

Miami Herald Publishing Co., Division of Knight-
Ridder Newspapers, Inc. v. Ferre,
636 F. Supp. 970 (S.D.Fla. 1985)..... 12

Mullane v. Central Hanover Tr. Co., 399 U.S. 306,
70 S.Ct. 652, 94 L.Ed.2d 865 (1950) 17

Northflor Constr. v. City of Gainesville, 512 So.2d 266 (Fla. 1st DCA 1987), *rev. denied*, 520 So.2d 585 (Fla.1988)..... 25

Ohio Hoist Manufacturing Co. v. LiRocchi, 490 F.2d 105 (6th Cir. 1974), cert. denied 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661 12

Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398 (1962) 17

Scozari v. Barone, 546 So.2d 750 (Fla. 3dDCA 1989).12

Smith v. DeLoach, 556 So.2d 786, 789 (Fla. 2d DCA), *review denied*, 564 So.2d 1087 (Fla. 1990)..... 25

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)..... 8, 18, 19, 27, 30

Weiss v. Berkett, 949 So. 2d 1092 (Fla. 3d DCA 2007).. 6, 20

Weiss v. Estate of Courshon, 990 So.2d 611 (Fla.3d DCA 2008) ..... passim

FEDERAL STATUTES

28 U.S.C. § 1957(a) 1

28 U.S.C. §1963..... 12

RULES

Fla. R. App. P. 9.030(a) 1, 30

Fla. R. Civ. P. 1.230..... 4

Fla. R. Civ. P. 1.420(e) ..... passim

Fla. R. Civ. P. 1.540 ..... passim

Florida Probate Rule 5.120 (a)..... 4,9

Florida Prob. Rule 5.241 "Notice to Creditors"..19,27

Florida R. Evidence 90.202(f) 11, 27

Supreme Court Rule 10(c) 1

OTHER

Bruce J. Berman, Florida Civil Procedure, 2007 ed. vol. 4 at ¶ 420.5 ..... 20, 24

Bruce J. Berman, Florida Civil Procedure, 2007-2008 ed. vol. 4 ¶ 420.5, fn. 104 at page 584. 24

Committee Notes to Fla. Prob. R. 5.241 7,8

Committee Notes to Fla. R. App. P. 9.030 30

CONSTITUTIONS

Florida Constitution Article V §3(b) (1980) 30

UNITED STATES CONSTITUTION
(Due Process & Equal Protection) ..... passim

TABLE OF APPENDICES

ORDER OF MOTION TO DISMISS FOR LACK OF PROSECUTION dated January 25, 2008 and filed on January 28, 2008 ..... a-1

OPINION AND ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL, dated and filed August 27, 2008 ..... a-3

United States Constitution, Amendments V & XIV.. a-9

Florida Rule of Civil Procedure 1.420(e)..... a-10

OPINIONS BELOW

The opinion of the Court of Appeal,Third District of Florida dated August 27, 2008 is reported at 990 So.2d 611(Fla. 3d DCA 2008) [Appendix a- 3 to a- 8].

The decision affirmed the lower (circuit) court's unreported order dismissing the case. [a- 1 - a- 2].

STATEMENT OF JURISDICTION

Florida's Third District Court of Appeal entered its opinion and order on August 27, 2008. That opinion was not worded in a manner that was subject to any discretionary review by the Supreme Court of Florida. See Fla. R. App. P. 9.030 (a).

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). Sup. Ct. R. 10(c) authorizes the petition because a state court decided important questions of federal law that have not been and should be settled by this Court, and/or decided questions in a way that conflicts with relevant decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions of the United States Constitution are reprinted in the Appendix at a- 9. They include the Due Process Clause, the Equal Protection Clause and the Privileges and Immunities Clause, which are included in the Fourteenth Amendment.

The provisions of Florida Rule of Civil Procedure 1.420(e) Dismissal of Actions- [(e) Failure to Prosecute] is reprinted in the Appendix at a- 10 .

STATEMENT OF THE CASE AND THE FACTS

PATRICIA POLLAK WEISS (herein "WEISS") was the Plaintiff in a case pending in the General Jurisdiction Division of the lower court until it was dismissed for lack of prosecution in January 2008. The case was filed against ARTHUR H. COURSHON and JACK R. COURSHON in 2000.

The causes of action included: abuse of process, wrongful execution, negligence, conspiracy, and intentional infliction of emotional distress. The facts upon which the claims were based were, *inter alia*, ARTHUR & JACK COURSHON's intentional registration (recording) of a federal judgment in an excessive amount against WEISS in New York (New York County and in the Southern District of New York) and then deliberately failing to rectify the matter when it was called to their attention. The amount recorded was hundreds of thousands of dollars more than it should have been.

Various discovery requests were made and responded to over the years, although frequently by objections to the requests. No hearings were held. ARTHUR COURSHON became aged and ill, and he eventually died on January 6, 2006. According to records in the Probate Court file, his Estate was valued at under $500,000, and it did not include any federal judgment against WEISS as an asset.

As the Miami-Dade County Clerk's on-line docket [R. 119] attached to the Notice of Appeal [R. 117-120] shows, WEISS timely filed a notice of suggestion of death on the record and also a motion for substitution of proper party [R. 113-116]. A hearing by special appointment was set for May 24, 2006, but it had to be canceled *sine die* because there still had not been an appointment of a Personal Representative, although the purported will had been sought to be admitted in Probate Court in Broward County. At that time, it was unknown whether ARTHUR COURSHON's widow Carol B. Courshon would become the Personal Representative of her husband's Estate. ARTHUR COURSHON's first cousin, a local attorney named William S. Pollak (who is also a first cousin to WEISS) was assisting Carol B. Courshon with probate matters at that time.

According to the on-line docket sheet, [R. 119], a "FWOP NOTICE GENERATED" event occurred on "10/25/07". However, the court file does not contain any signed or unsigned original or copy of whatever was "generated" by the Clerk's Office. Nor is any document of that nature identified in the Index to the Record on Appeal as having been placed in the court file between October 2007 and January 2008 (or since that date). So that event is puzzling. The undersigned believes that the Clerk's office automatically created some sort of form document that was never signed by any judge nor clerk nor mailed to WEISS by anyone. That is why there is actually no *sua sponte* order to show cause or notice from October 2007 (or thereafter) in the court file.

On January 16, 2008, Appellant WEISS wrote a 4 page letter to Judge David C. Miller, attaching (by

staples) a copy of WEISS' pending motion to vacate certain orders of the Probate Division case of In Re: Estate of Arthur H. Courshon #06-3669 (CP) (02).

Two originals of the letter were sent to the courthouse, each with an attachment of a copy of WEISS' pending motion to vacate certain probate court orders in the In Re: Estate of Arthur Courshon case. The Motion was entitled: PATRICIA POLLAK WEISS' VERIFIED MOTION TO VACATE THE JANUARY 2, 2007 "FINAL JUDGMENT AND ORDER DIRECTING PAYMENT OF ATTORNEYS FEES AND EXPENSES", THE UNDATED MARCH 2007 "ORDER GRANTING PETITION FOR DISTRIBUTION" AND THE OCTOBER 2007 "FINAL ORDER OF DISCHARGE" PURSUANT TO FLA.R.CIV.P. 1.540 AND MOTION TO INTERVENE PURSUANT TO FLA. R. CIV. P. 1.230 AND MOTION TO FILE A CLAIM AGAINST THE ESTATE AND MOTION FOR APPOINTMENT OF AN ADMINISTRATOR AD LITEM PURSUANT TO PROBATE RULE 5.120(A) AND MEMORANDUM OF LAW IN SUPPORT." It contained 10 exhibits, color tabbed, including various Probate Court statements in Exhibit 6, which notably failed to include WEISS as a creditor or potential creditor of the estate. The final page of Exhibit 6, shows a "notice by publication" in November 2006.

Judge Miller's Judicial Assistant Ms. Alarcon signed an Express Mail receipt for the originally signed letter that was sent to the Judge's Chambers. The General Jurisdiction Division Clerk's Office signed for the second original and a second Chambers copy, and each had a copy of WEISS' Probate Court motion to vacate certain orders stapled to it. (NB: None of the three could be located by the Clerk's Office and so

WEISS has filed a motion to supplement the record to include the letter and the Probate Court motion attached to it and referenced in the letter. WEISS had submitted substantial evidence of receipt of those documents at the courthouse. The motion was granted.)

The letter stated:

" PATRICIA POLLAK WEISS
Post Office Box 751
Sag Harbor, NY 11963-0019
(631) 725-4486
January 16, 2008

The Honorable David C. Miller
Circuit Court of the 11th Judicial Circuit
73 West Flagler Street- Room 414
Miami, FL 33130

RE: PATRICIA POLLAK WEISS, Plaintiff v. ARTHUR H. COURSHON and JACK COURSHON, Defendants #2000-6009-CA-22 (Judge David C. Miller)

Dear Judge Miller:

I am writing in response to what the Clerk's on-line docket entry of October 25, 2007 describes as a "FWOP NOTICE GENERATED" for January 25, 2008. I have not yet received a copy of what I believe to be Your Honor's notice and/or order relating to the possibility of an order of dismissal for lack of prosecution being issued. On Monday, January 7th, an attorney checked the case file for the actual order or notice, but it was not in the file. I

told all of the foregoing to Your Honor's Bailiff Bob last week, and he indicated to me that it was quite possible that no formal notice or order had yet been mailed to me. I also spoke to Your Honor's Judicial Assistant Maida Alarcon, who suggested that I write a letter to the Court explaining why I believe this case should not be dismissed for lack of prosecution, and to also make a written request to be heard telephonically on January 25, 2008 at 9:00 A.M. because I reside in New York.

I am generally familiar with Fla. R. Civ. P. 1.420(e), as amended. Although I have not yet seen the order/notice, I will assume, for purposes of this letter, that Your Honor's standard order/notice "FWOP" complies with the newly amended Rule. I am fully aware that certain form orders that judges have used over the years no longer comply. See Weiss v. Berkett, 949 So. 2d 1092 (Fla. 3d DCA 2007).

Defendant Arthur Courshon died on January 6, 2006.

Following his death, I timely served and filed a "Suggestion of Death" on the record and also "Plaintiff Patricia Pollak Weiss' Motion For Substitution of Proper Party In Place of Decedent Following Her Notice of

"Suggestion of Death" Concerning the Death of Arthur H. Courshon.".

I also served and filed a notice of a May 24, 2006 hearing for that motion. I sent copies to Defendants' counsel Alvin B. Davis, Esq. and to William S. Pollak, Esq., who had filed Arthur Courshon's purported will in Broward County. However, I eventually had to call J.A. Anna Delgado and cancel that hearing date because no Personal Representative ("P.R.") had been judicially appointed by that date.

Neither Mr. Davis nor Mr. Pollak (who ultimately became the P.R.'s attorney) ever notified me that the probate matter was transferred from Broward to Miami-Dade County and was proceeding in Miami-Dade with Arthur Courshon's widow as the judicially appointed P.R. As a potential creditor of the Estate of Arthur Courshon (because of this lawsuit), I was constitutionally entitled to direct personal notification of the last day by which to file a claim (concerning this suit) in the probate matter. The United States Supreme Court has held that "notice by publication" does not comport with the Due Process Clause in the context of a probate matter where the address of a creditor or potential creditor is known or reasonably ascertainable. See generally, Committee Notes to Fla. Prob. R.

5.241, citing to Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). See also the analysis set forth in Estate of Pope v. Tulsa Professional Collection Services, Inc., 808 P.2d 640 (Okl. 1990).

I did not learn of the "closed" Miami-Dade Probate case until November 21, 2007, as I had been checking the on-line docket of the Broward County probate matter, which showed the probate as still "open".

It is my position that Mr. Davis breached his duty to notify both me and the Court that a P.R. had been judicially acknowledged and to take steps to have the P.R. be substituted into this case as the proper party defendant. Therefore, any judicially perceived delay in prosecution should not be attributed to me as the plaintiff.

On December 17, 2007, I served copies of the attached motion to vacate certain orders in the In Re: Estate of Arthur Courshon case #06-3669 CP (02) and moved

to intervene in order to file a claim against the Estate. The motion also requested appointment of an administrator ad litem.

See Fla. Prob. R. 5.120 (a). The original was filed on December 21, 2007, and it is now pending before Judge Rothenberg,

I personally spoke to the P.R.'s current attorney Allan M. Glaser, Esq. on January 11, 2008 regarding scheduling that motion to be heard. He indicated that my motion was "well taken". In light of that fact, he opened up settlement negotiations. We discussed the terms of a "global settlement" which would involve both this case and the claims that I would make in the probate matter. I do not believe that it is appropriate for me to divulge the terms of ongoing settlement discussions, except to say that the settlement would involve Defendant Jack Courshon as well. I will keep Your Honor informed of our progress with respect to our settlement paperwork that would need to be "so ordered" by Your Honor.

It is likely that the Estate of Arthur Courshon will need to be re-opened to accomplish the settlement of this case. I am still looking into the most expedient procedures. I seriously doubt that will be accomplished by January 25th.

Generally, an exception to dismissal for lack of prosecution exists when there is another pending case involving the same parties. See Insua v. Chantres, 665 So.2d

289 [(Fla.3d DCA 1995] ("It is well settled that the pendency of another related action provides justification for apparent non-activity, precluding dismissal for failure to prosecute..."). That seems to be the situation here, because of the automatic stay in this case due to a defendant's death and my pending motion in the probate matter.

I am therefore requesting that Your Honor not dismiss this case for lack of prosecution, as that would create further complications and expenses for everyone concerned, including Carol B. Courshon, the widow of Arthur Courshon. If that the January 25th date is not *sua sponte* postponed or adjourned, I shall telephone Your Honor's Chambers at 9:00 A.M. on January 25th to be heard telephonically.

By copy of this letter, I am requesting the Mr. Davis file the appropriate papers with the Court to indicate that the name of his law firm is now Squires Sanders Dempsey L.L.P. and not Steel Hector & Davis, LLP.

Very truly yours,

/s/

11

Patricia Pollak Weiss, *pro se*
[admitted to NY Bar, active]
[admitted to CA Bar, inactive]

cc: Alvin B. Davis, Esq. (with probate motion attached)
Allan M. Glaser, Esq. (attachment previously provided)"

That letter (with a copy of the Probate Court motion) was received and filed [R. 119] by the General Jurisdiction Clerk on January 17, 2008, which was more than a week before the January 25, 2008 9:00 A.M. time shown on the on-line docket.[1]

Copies were sent to Alvin B. Davis, Esq. (with a copy of the Probate Court motion also) and to Allan M. Glaser, Esq. (to whom WEISS had previously sent a copy of the motion. See fn. 4.

Opposing counsel Mr. Davis did not serve and file any objections, nor any agreement with, WEISS' explanatory letter to Judge Miller. [R. 119].

Notwithstanding WEISS's detailed letter, Judge Miller dismissed the case for lack of prosecution on January 25, 2008. [R. 118] The order appears to be a form order with an "X" in a boxed area beside the typewritten words on a form. See a-1 - a-2.

That final order was timely appealed, following its rendition on January 28, 2008. [R. 117-120].

---

1. Copies of two USPS Express mail mailing receipts and on-line tracking form and a FedEx invoice are attached to WEISS' motion to supplement, and she requested that the appellate court take judicial notice of its own records. Fla. R. Evid. 90.202(f).

Following Judge Miller's decision, Respondents refused to enter into any sort of "global settlement" with Petitioner and as a result the federal judgment registered in New York still reflects an incorrect amount that fails to show the initial reduction of $500,000 in punitive damages that was ordered by the Southern District of Florida (Hoeveler, J.) before the appeal was taken and also a subsequent reduction of nearly $500,000 following a remand from the Eleventh Circuit.

Wrongful registration of a federal judgment is indeed a state claim and one that is recognized by a federal court. See Ohio Hoist Manufacturing Co. v. LiRocchi, 490 F.2d 105 (6th Cir. 1974), cert. denied 417 U.S. 938, 94 S.Ct. 2654, 41 L.Ed.2d 661 [state claim lies for wrongful registration when using 28 U.S.C. §1963]. This is also considered to be an abuse of process claim under Florida law because the process created for registration of federal judgments in other states was neither intended nor designed to allow Respondents to register an excessive judgment in a foreign jurisdiction when it was unlawful to register an excessive judgment which was substantially greater than what the federal district judge had ordered to be the accurate amount. See Macia v. Macia, 670 So.2d 190 (Fla. 3d DCA 1996), Scozari v. Barone, 546 So.2d 750 (Fla. 3d DCA 1989); Miami Herald Publishing Co., Division of Knight-Ridder Newspapers, Inc. v. Ferre, 636 F. Supp. 970 (S.D.Fla. 1985). Appellees also deliberately refused to make the necessary further reduction of nearly $500,000.00 after a recalculation of punitive damages following the Eleventh Circuit's remand.

The statement submitted by the certified court reporter who Petitioner retained stated that she arrived in Judge Miller's courtroom on January 25, 2008 at 8:40 A.M. in plenty of time for the 9:00 A.M. "hearing" that she intended to transcribe, and that Judge Miller's Judicial Assistant Naida Alarcon told her that "no hearing was going forward" and that the Judicial Assistant told her that the case had been "resolved" and that there would be no hearing that morning. The Court Reporter stated in writing that she stayed in the courtroom until the judge stopped calling cases, at about 9:20 A.M.

Although the Third District's opinion mentions that Judge Miller telephoned to advise Petitioner that the case had been dismissed and left a message on an answering machine to that effect, Petitioner was present at that office number and had begun calling Chambers and had spoken to the Judicial Assistant even earlier than 9:00 A.M. and learned that her court reporter was already present in the courtroom. Unfortunately, the Florida court does not utilize a "court call" system that links parties into chambers and keeps them "on hold" until the judge is ready to talk to that party (as New York and California do). Unfortunately, most modern day telephone calling plans, such as Petitioner's, no longer itemize long distance calls which could provide "proof" of calling into Chambers. In any event, as such "proof" would not be a part of the record prior to issuance of an order, it could not be considered on appeal. Florida does not require any rehearings below.

Petitioner argues that the case should have been remanded to the lower court judge after substituting the ESTATE OF ARTHUR COURSHON for the decedent.

Reasons for Granting The Writ

I. The State Court Decision Below Establishes An Intolerable Precedent in the Balance of Powers, Meriting This Court's Judicial Scrutiny Because It Conflicts With This Court's Established Precedent Concerning The Due Process Clause's Requirements of "Notice and a Fair Opportunity To Be Heard", and Florida State Courts Must Follow the Rule of Law To Prevent Nationwide Harm Because What Happens in the Florida Courts Affects What Happens in New York And Elsewhere

This petition requests that this Court consider the applicability of the Due Process Clause in two different contexts. In the first instance, Petitioner argues that she was not served with any legally sufficient "notice" that Florida nowadays requires precede a dismissal for lack for prosecution because the only "notice" provided to anyone was a cryptic reference on an a electronic website that a "FWOP" had been"GENERATED" without any evidence in the record that an actual written notice ever existed or was "served" upon Petitioner or anyone else.

In the second context, Petitioner argues that Respondent ARTHUR COURSHON and the ESTATE OF ARTHUR COURSHON did not personally serve Petitioner with the personal notice that this Court has required decedent's personal representatives to serve upon Petitioner in the probate case. Had such which notice (of the identity of the probate court in which claims against the ESTATE could be filed) been served

upon Petitioner as constitutionally required in 2006, it would have been instrumental in getting this case back on the track of a civil prosecution, in which the decedent would have timely been replaced by his estate and/or personal representative.

It is concretely apparent from the Third District's opinion that the court had lost patience with WEISS's various appeals over the past twenty years since her father died. However, each case must be adjudicated on its own merits, and the issue here relates to whether or not the purported was "notice" given was legally sufficient under the Due Process Clause. It was not.

The Third District's order states that "The circuit court docket indicates that a notice of dismissal for lack of prosecution was issued on October 25, 2007, with good cause to be shown before a January 25, 2008 hearing at 9:00 a.m." However, the docket indicates merely that such a notice was "generated" (by the Clerk's office) and does not state that it was issued or served. WEISS's letter notes that the Bailiff seemed familiar with such notices generally but "indicated to me that it was quite possible that no formal notice or order had yet been mailed to me." In all likelihood, the Clerk merely sends some forms to the judge's chambers and leaves it up to the judge to serve them by mail or not. In preparing the record on appeal, the Clerk's office never found a hard copy of any such purported notice or order; the appellate decision does not cite to one. Despite Petitioner's motion that Respondents supplement the appellate court record with a copy of the purported notice or order if they had one, Respondents never produced any hard copy of any notice or order. In

all probability, no such notice or order even exists. There is no form of any "notice" for this Court to review apart from the words on a Court's computerized e-docket docket posted on the website. That website entry falls far short of what the United States Constitution requires under the Due Process Clause.

There are certainly some courts throughout the country which require "electronic case filing". However, in those courts, the entire order is typed out or a link to a "pdf" file is provided so that the entire notice or order can be read by the viewer. In addition, there is a procedural formality for converting paper cases into"ECF" cases. And typically *pro se* parties are excluded from being held to a civil procedure that excludes being served by mail with a formal "written notice."

Here, however, the procedure utilized by Florida's lower court and its Third District Court of Appeal was far too abbreviated and fell below the minimum requirements of Due Process. For example, what exactly is a "FWOP" and what does it mean when one is "generated"? The website does not even explain whether a physical appearance by a plaintiff is required or whether a telephonic appearance will be granted. Fla. R. Civ. P. 1.420(e) mentions only that good cause should be shown in writing 5 days before the stated date. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) holds that a court is not required to provide a party with oral argument and there is nothing in the record to suggest that Petitioner was actually required to be present in person or by telephone because there is no notice or order in the record that

explains what the lower court's procedures were, what this particular judge expected, or whether oral argument was permitted. Those details were entirely omitted from what appeared on the website. Therefore, the submission by Petitioner which was a signed 4 page letter that attached a copy of a sworn motion that was pending before another judge and filed with the circuit court clerk in the same circuit court should have sufficed for both the lower court and the appellate court.

Importantly, the appellate court does not quote from the purported "notice" afforded Petitioner, nor to any evidence that it actually exists or how it was supposedly "issued". The fact is that it was never "served" by anyone upon Petitioner, and a state procedure that allows what occurred is flatly unconstitutional.

In Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398 (1962), this Court held that publication of notice in newspapers many miles from plaintiff's property and posting on trees and poles in the general vicinity of vacant property, did not constitute notice required by the Due Process Clause of the 14th Amendment, especially where plaintiff's name and address were readily ascertainable from the public records. It cited *inter alia*, Mullane v. Central Hanover Tr. Co., 399 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.2d 865 (1950) for the proposition that an elementary and fundamental requirement of Due process is any proceeding which is to be accorded finality is notice reasonably calculated under all circumstances, to inform the interested parties of the

pending of action and afford them an opportunity to present their objections. Posting "FWOP" on an e-docket is similarly flawed when it is the sole documentary evidence of "notice", as it is in this case.

The lower tribunal's January 25, 2008 "Order On Motion To Dismiss For Lack Of Prosecution" should be reversed as a matter of law because the procedural mandates of Fla. R.Civ.P. 1.420(e) were not followed, insofar as Judge Miller never signed or mailed nor served any actual written "notice" to WEISS, a New Yorker, alerting her of the lower court's *sua sponte* intention to dismiss the case for lack of prosecution, and so the "60 day" period **after notice** never really commenced.

The minimal "notice" that WEISS constructively received from the Clerk's website was far less than she was entitled to receive, and the notice was legally insufficient under both the Due Process and Equal Protection Clauses of the United States Constitution.

In any event, WEISS' January 16, 2008 (unopposed) explanatory letter to Judge Miller requesting that the case not be dismissed concretely demonstrated that WEISS had pending a motion in the ancillary matter of *In Re: Estate of Arthur H. Courshon*, in which WEISS was likely to be successful given the United States Supreme Court precedent of Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), which required the Personal Representative of THE ESTATE of ARTHUR H. COURSHON to provide actual

notification to WEISS by mail or another means equally as certain, informing WEISS of the place, court and deadline to file claims against the Estate. The letter and the probate court motion demonstrated that during the 60 day period preceding the order of dismissal there had been activity in a related case involving WEISS and the Estate of the party in this case. Such activity in a related case has traditionally been accepted as an exception to grounds for dismissal for lack of prosecution, as WEISS explained to Judge Miller. See Insua v. Chantres, 665 So. 2d 288, 289 (Fla. 3d DCA 1995) ("It is well settled that the pendency of another related action provides justification for apparent non-activity, precluding dismissal for failure to prosecute..." (citations omitted)") See also Cox v. Wiod, Inc., 764 So.2d 671 (Fla.4th DCA 2000), cited *infra*.

THE ESTATE OF ARTHUR COURSHON intentionally eschewed this Court's precedent in the Tulsa case and constitutional law explained therein, which is also described in the Probate Code commentaries (Committee Notes) for Probate Rule 5.241 "Notice to Creditors". "But for" that intentional and deliberate misconduct of fraud upon the court (and other conduct designed to deceive WEISS about the status of the Probate Court matter) on the part of the ESTATE's Personal Representative, and others who knew or should have known that notice by publication alone was legally insufficient, the General Jurisdiction case would have never been dismissed for lack of prosecution because there would have been a substitution of the Personal Representative and the General Jurisdiction case would have proceeded along without any lapse of activity. Therefore, reversal on equitable estoppel

grounds is proper so that WEISS does not suffer as a result of others' misleading misconduct.

The amended Rule 1.420(e) reflects a relatively new procedure and other panels of that court had followed it. See Weiss v. Berkett, 949 So.2d 1092 (Fla. 3d DCA 2007) ("The trial court has exceeded its jurisdiction as the order under review does not comport with the requirements of Florida Rule of Civil Procedure 1.420(e) for dismissal for lack of prosecution.")

Fla.R.Civ.P. 1.420(e) was amended in 2005 and that amendment became effective on January 1, 2006. WEISS is entitled to a full "60-day" period **after notice** by the lower court within which to re-commence prosecution of the action and avoid dismissal for failure to prosecute it.

The Record on Appeal is devoid of any "notice" that the lower court might have given. In addition, WEISS' January 16, 2008 letter documents a telephone conversation that WEISS had with Judge Miller's Bailiff Bob, in which WEISS requested a copy of the notice or order to show cause and Bailiff Bob stated that it was quite possible that no order or notice had yet been mailed. Bruce J. Berman, Florida Civil Procedure, 2007 ed. vol. 4 at ¶ 420.5, discusses the amendment to Rule 1.420(e) at pages 576-584. The author explains the 2005 amendment's new procedure which appertains to the facts of this case, beginning at page 564:

¶420.5 Involuntary Dismissal for Failure to Prosecute; Subdivision (e).

" ... Rule 1.540(e) has generated

extensive case law because of the malpractice exposure to lawyers where non-prejudicial dismissals nevertheless preclude re-filing after expiration of the statute of limitations. As a result, the Civil Procedure Rules Committee submitted to the Supreme Court a proposed amendment that would significantly alter subdivision (e) to increase the likelihood that cases would be resolved on the merits rather than based on a procedural misstep. The Supreme Court subsequently adopted that proposed amendment, effective January 1, 2006. [fn 55 See In re Amendments to The Florida Rules of Civil Procedure (Two Year Cycle), 917 So.2d 176, 177 (Fla. 2005)] That amendment replaced the 1-year period of inactivity on the face of the record with a 10-month period and further provided that, following service on all parties of a notice that there has been no record activity for 10 months, the plaintiff shall have 60 days within which to take action of record, and thereby avoid dismissal for failure to prosecute. [fn 56. "See In re Amendments to The Florida Rules of Civil Procedure (Two Year Cycle), 917 So.2d 176,181-182 (Fla. 2005) (and Committee Note to 2005 Amendment, at 182]."

The Berman text further explains at page 565:
" [3] *The "10 Months" is that Which Precedes the Notice.* As a result of the 2005 amendment, if it "appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and that no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a

> party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred." The plaintiff then has 60 days from the date of service of the notice within which to re-commence prosecution of the action and avoid dismissal for failure to prosecute. If no record activity occurs within this 60-day period (and "no stay was issued or approved prior to the expiration of such 60-day period"), "the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending."

The Berman text also specifically discusses the earlier version of Rule 1.420(e) at page 565, referring to the Third District Court of Appeal's opinion, and noting that:

> "...One appellate court has noted that the practice of some courts to use a form of conditional order of dismissal similar in content to Form 1.989(b) "can cause confusion and uncertainty over issues of finality" because the order is subject to conditions subsequent (i.e., failure to make a showing of good cause) before becoming effective"), [citing in footnote 59 to] "59. Lynbrook Court Condo Ass'n. v. Arana, 711 So.2d 249, 250 n. 2 (Fla. 3d DCA 1998)

citing to Ponton v. Gross, 576 So.2d 910, 911 (Fla.1st 1991) and Dept. of Transp. v. Post, Buckley, Schuh & Jernigan, 557 So.2d 145, 146 (Fla.1st DCA 1990)."

WEISS was entitled to a full "60-day" period without being subjected to a dismissal of this case. WEISS was never provided with any copy of the notice of order that perhaps was "generated" on a Clerk's computer form and passed along to the judge's chambers, yet never signed and mailed to WEISS, which explains why no original nor copy of the purported notice appears in the court's records and was never produced by Respondents' counsel. Therefore, WEISS was unable to read what it was the judge required to keep the case "alive". Given the lack of any proper notice by the lower court and a full "60" day period in which the rectify the lack of activity, WEISS alone could not cause the timely filing of whatever it was Judge Miller required in order to keep the case "alive".

The pendency of Petitioner's December 2007 motion to vacate certain probate court orders in *In Re: Estate of Arthur Courshon* provides justification for apparent non-activity, precluding dismissal for failure to prosecute, and Petitioner had provided that explanation by attaching a copy of that motion to the letter to Judge Miller and by referring to the originally sworn original of that motion which was already part of the record in the same Miami-Dade County Clerk's Office.

The letter and the probate court motion demonstrated that there was activity in a related case, which has traditionally been accepted as an exception to

grounds for dismissal for lack of prosecution in Florida, as WEISS explained to Judge Miller. Judge Miller eschewed this Third District's prior holding in Insua v. Chantres, 665 So. 2d 288, 289 (Fla. 3d DCA 1995) ("It is well settled that the pendency of another related action provides justification for apparent non-activity, precluding dismissal for failure to prosecute..." (citations omitted)" as quoted in Bruce J. Berman, Florida Civil Procedure, 2007 ed. vol. 4 at ¶ 420.5, fn 101 page 573 & and also 2007-2008 ed. vol. 4 ¶ 420.5, fn. 104 at page 584. Footnote 104 also cites to Cox v. Wiod, Inc., 764 So.2d 671 (Fla. 4th DCA 2000), which is another case that supports this rule of law throughout the State of Florida.

In Cox, former Miami Dolphins football player Bryan Cox filed a lawsuit for slander, unauthorized publication of name or likeness and invasion of privacy-false light. Cox claimed that a radio talk show broadcasted statements concerning his "sexual orientation". The trial court granted defendants' motion to appoint a commissioner in Connecticut for the purpose of taking the deposition of ESPN's records custodian for use in their defense against Bryan Cox. As a result of the subpoena duces tecum to which ESPN objected, lengthy litigation ensued in Connecticut. In response to a motion to dismiss for lack of prosecution, Cox submitted, as proof of good cause, a notice of filing record activity of the Connecticut pleadings between the defendants and ESPN. The trial judge dismissed Cox's claims but the Fourth District (Shahood, Stone, Farmer, JJ) reversed and remanded for reinstatement of the case. In so doing, it explained:

" ... For a party to establish good cause, it must show a compelling reason to avoid dismissal where there has been no record activity. *See Northflor Constr. v. City of Gainesville*, 512 So.2d 266, 268 (Fla. 1st DCA 1987), *rev. denied*, 520 So.2d 585 (Fla. 1988).

It is well settled that the pendency of another related action provides justification for apparent non-activity, precluding dismissal for failure to prosecute under Rule 1.420(e), Florida Rules of Civil Procedure. *See Insua v. Chantres*, 665 So. 2d 288, 289 (Fla. 3d DCA 1995).

In order to show good cause as to why the action should remain pending when the record is devoid of activity within the preceding year, a party must show that he is justifiably prevented from proceeding with the lawsuit because of another pending action or that some action taken by the opposing party misled him about the necessity to continue prosecuting the case, creating an equitable estoppel situation. *See Smith v. DeLoach*, 556 So.2d 786, 789 (Fla. 2d DCA), *review denied*, 564 So.2d 1087 (Fla. 1990).

We hold that appellees' actions by engaging in protracted litigation in Connecticut for the sole purpose of taking the deposition of an out-of-state witness and to obtain further discovery materials

> necessary for their use in their defense in this case justifiably prevented appellant from proceeding with his case. Although appellant could have arguably announced his readiness for trial, any attempt to proceed with the prosecution of the litigation would have been futile in light of appellees' pending ancillary proceeding directly relating to this case.
>
> Accordingly, we reverse and remand with directions to reinstate appellant's cause of action."

Quite obviously, when a defendant dies, and there are delays in the appointment of a Personal Representative, the pending lawsuit cannot proceed. The Third District should have therefore embroidered a further exception onto Rule 1.420(e) that takes into account that there are instances when a decedent's will cannot be promptly located and accepted by a Probate Court, that there are delays in an appointment of a Personal Representative, and there may be delays in the communication to a known claimant or litigant of the identity of a Personal Representative. Those factors may create a delay of over 10 months, as is the case here.

In any event, reversal was required as a matter of law because of the futility of WEISS proceeding in the General Jurisdiction case until the Probate Court issues are first resolved.

The doctrine of equitable estoppel also requires reversal because the Respondents nor ARTHUR COURSHON's widow should profit from their fraud upon the court insofar as preventing Petitioner from l

litigating the General Jurisdiction Division claims by the personal representative's deliberate failure to provide Petitioner with constitutionally sufficient actual notice of the information that would be necessary for Petitioner to prosecute the claim.

A Florida Personal Representative is required to provide actual notice to a known creditor so that a claim against the Estate can be filed in the Probate court action, and such actual notice must be my mail or a manner at least as certain. Judicial notice should be taken that this law is so fundamental and universally recognized that it is written into the Probate Code commentaries for Probate Rule 5.241 (See Probate Rule 5.241 "Notice to Creditors") and the United States Supreme Court case of Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed 2d 565 (1988) is cited therein.

It is also clear from the exhibits attached to the motion to vacate some of the Probate Court orders that Carol B. Courshon was well aware of the lawsuit *sub judice*, for the reasons explained in WEISS' motion at ¶¶ 11-17, of which WEISS requested that the appellate court court take judicial notice of its own court records. Fla. R. Evidence 90.202(6).

WEISS filed a motion to add/substitute Carol B. Courshon (THE ESTATE OF ARTHUR COURSHON's personal representative) (or in the appellate court's discretion, alternatively, of an administrator *ad litem* who does not possess the personal conflicts of interest

that Carol B. Courshon has shown[5]) in the place and stead of the deceased defendant ARTHUR H. COURSHON. The appellate court granted the motion insofar as making the ESTATE a party however it condoned the type of misconduct that is exactly what the United States Supreme Court held a State cannot authorize because it transgresses the Due Process Clause's "notice and an opportunity to be heard", as guaranteed by the Bill of Rights. Had Carol B. Courshon and/or the ESTATE OF ARTHUR H. COURSHON provided WEISS with the constitutionally required personal "notice and opportunity" to file a claim in the Probate Division, then Judge Miller wouldn't have been confronted with the situation of deciding, in January 2008, whether or not the case *sub judice* should even be dismissed for lack of prosecution because the judge would have likely already ordered that the substitution be made in this case, in response to WEISS's timely filed motion for substitution that was then pending in this case, and there would have been sufficient ongoing activity.

However, it is clear that by only using "publication" and by failing to take any steps to actually notify WEISS (or even the court below at least by mail)

---

5. CAROL B. COURSHON is the substantial beneficiary/legatee under ARTHUR H. COURSHON's will and in similar cases Florida courts have appointed persons who do not have such an apparent conflict of interest to handle matters of settlement of claims against the estates. See, for example, Continental National Bank v. Brill, 636 So.2d 782 (Fla.3d DCA 1994) and Continental National Bank v. Brill, 638 So.2d 1056 (Fla. 3DCA 1994)

that a Personal Representative had finally been appointed in a probate court other than the probate court to which the will was initially admitted, JACK COURSHON, CAROL B. COURSHON and THE ESTATE OF ARTHUR H. COURSHON were defying United States Supreme Court precedent upon which WEISS could, and did, justifiably rely.

II. Because of Florida's Constitutional Provisions Which Constrain All Discretionary Certiorari Jurisdiction, The Third District's Decision Condoning Mere "E-Notice by Abbreviation" Represents A Fundamental Unfairness That Conflicts With This Court's Prior Precedent and Transgresses Fundamental Rights.

Regrettably, the opinion in this case was not composed in a manner that allows the Supreme Court of Florida to exercise its discretionary jurisdiction. Fla. R. App. P. 9.030 establishes the parameters of the subject matter jurisdiction of the Florida Supreme Court. Where a mid-level appellate court writes an opinion which does not "expressly and directly conflict with a decision of another district court or appeal or of the supreme court on the same question of law", or otherwise compose a "certified" decision, a Florida district court of appeal constitutes the court of last resort and Florida's highest court lacks any ability to adjudicate a case even when it is clear that the decision offends the United States Constitution.

This means, for nearly all Florida litigants, most questions concerning the uniform application of Florida civil procedure and the due process and equal protection

principles announced in the Tulsa Professional Collection Services, inc. v. Pope case can never be standardized through the State of Florida because of the constitutional modifications in the Supreme Court of Florida's jurisdiction as approved by the electorate on March 11, 1980. See Article V. § 3(b) Fla. Const. (1980)

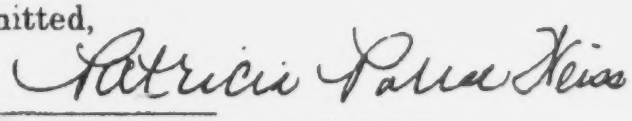
As explained in the Committee Notes to Fla.R.App.P. 9.030, "The impetus for these modifications was a burgeoning caseload and the attendant need to make more efficient use of limited appellate resources. Consistent with this purpose, revised subdivision (a) limits the supreme court's appellate, discretionary, and original jurisdiction to cases that substantially affect the law of the state."

Unfortunately, this means that the decision sought to be reviewed is not capable of being reviewed by Florida's highest court because of the way that it was written without any citation to a conflicting case or a Florida Supreme Court case, and so the State of Florida now lacks any meaningful judicial procedure that permits the Florida Supreme Court to ensure that the lower court's afford Due Process and Equal Protection to its litigants by allowing the Supreme Court of Florida to review the decisions that Amend. XIV requires it to scrutinize.

CONCLUSION

This Court should accept jurisdiction because of two important issues: (1) whether a mere "posting" of an abbreviated cryptic message on a Florida lower court's electronic computer docket ("e-docket") is sufficient to comport with the Due Process Clause of the United States Constitution where no hard copy of any notice or order exists in the record or elsewhere, and (2) whether a decedent's estate and family members should be permitted to benefit from their lack of candor to WEISS, to the General Jurisdiction Court, and to the Probate Court by not personally serving Petitioner with notice of the court and date on which all creditors claims must be asserted in a Probate Court case, all of which thwarted Petitioner's ability to now cause Respondents to correct a wrongfully and incorrectly registered federal judgment in the clerk's offices in State of New York.

Dated: November 24, 2008
Respectfully submitted,



PATRICIA POLLAK WEISS,
Counsel of Record
P.O. Box 751
Sag Harbor, New York 11963
(631) 725-4486

ORDER ON MOTION TO DISMISS FOR LACK OF PROSECUTION dated January 25, 2008

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR MIAMI DADE , COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION
CASE NO. 00- 6009-CA-01

WEISS, POLLAK PATRICIA — Section No. 22

CIVIL DIVISION

Plaintiff(s)

vs.

COURSHON, ARTHUR H.
COURSHON, JACK R.

Motion, Notice and Judgment of Dismissal

Defendant(s)

ORDER ON MOTION TO DISMISS FOR LACK OF PROSECUTION

THIS CAUSE having come on to be heard pursuant to Rule 1.420 of the Fla.R.Civ.P, and the Court being fully advised in the premises.

___X__THE COURT FINDS that no party opposing the motion to dismiss for lack of prosecution having appeared as ordered and demonstrated the existence of the requisite record activity or that action had been stayed nor having timely filed a showing of good cause in writing, if required, and therefore, in the absence of any evidence to the contrary, the Court finds that (1) notice prescribed by Rule 1.420(e) was timely served; (2) there was no record activity during the 10 months immediately preceding service of the

foregoing notice; (3) there was no record activity during 60 days immediately following service of the foregoing notice; (4) no stay has been issued or approved by the Court; and (5) no party has shown good cause why this action should remain pending; *(called at 9:25 to (631) 725-4486 no answer left msg-dismissing case)DCM*

THEREFORE, IT IS ORDERED that this action is dismissed for lack of prosecution.

____ THE COURT FINDS good cause why this action should remain pending; therefore, IT IS ORDERD AND ADJUDGED that the Motion to Dismiss for Lack of prosecution pursuant to Florida Rule of Civil Procedure 1.420(E), is hereby DENIED.

DONE and ORDERED in Chambers at Miami-Dade County, Florida this ~~28~~ 25th day of January, 2008.

/s/ David C. Miller

Circuit Court Judge

cc: Counsel Parties of Record

In accordance with the Americans with Disabilities Act of 1990, persons needing a special accommodation to participate in this proceeding should contact the ADA Coordinator at the Dade County Courthouse, 75 West Flagler Street, Miami, Florida 33130, no later than seven days prior to the proceeding at 305-349-7175 (Voice); and 305-449-7174 (TDD) or the Florida Relay Service at 1-800-955-8770 or 1-800-955-8771.

Third District Court of Appeal

State of Florida, July Term, A.D. 2008

Opinion filed August 27, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D08-463
Lower Tribunal No. 00-6009

Patricia Pollak Weiss,

Appellant,

vs.

The Estate of Arthur Courshon, et al.,

Appellees.

An Appeal from the Circuit Court for Miami-Dade County, David C. Miller, Judge.

Patricia Pollak Weiss, in proper person.

Squire, Sanders & Dempsey, and Alvin B. Davis; Allan M. Glaser, for appellees.

Before WELLS, SUAREZ, and SALTER, JJ.

SALTER, J.

Patricia Pollak Weiss, pro se, appeals a final circuit court order dismissing her complaint against the appellees[1] for lack of prosecution. Although the case has been fully briefed and was initially scheduled for oral argument, we find that Weiss's arguments are unsupported by the record and are otherwise frivolous. Accordingly, we affirm the order below and we remove the case from the argument calendar.

Weiss commenced a lawsuit in the circuit court against the appellees in March 2000. The lawsuit claimed that federal and state process in prior Florida lawsuits was abused in proceedings to enforce a substantial judgment against Weiss in her home state of New York. Those claims were merely one more chapter in a series of bitter trust and estate disputes underway for over twenty years.[2]

In June 2000, the appellees moved to dismiss Weiss's lawsuit. She never set the matter for hearing.

---

[1] Weiss's pending motion to substitute the personal representative of the estate of Arthur Courshon as an appellee (following Courshon's death in 2006) is granted.

[2] See Weiss v. Courshon, 768 So. 2d 2 (Fla. 3d DCA 2000), and Weiss v. Berkett, 907 So. 2d 1181 (Fla. 3d DCA 2005). The latter decision contains an opinion that observes that the appeal represented Weiss's fifteenth appearance before this Court, that Weiss is herself an attorney in New York, and that by the time (1989) she was forced to resign as trustee of the trust established by her late father, she had "mismanaged, plundered and litigated into bankruptcy the assets left by [her father] for the future of his widow and children." Weiss, 907 So. 2d at 1184 (Shepherd, J., concurring in part, dissenting in part).

Each year, 2001-05, Weiss served a short request for admissions, set of interrogatories, or request for the production of documents. No depositions were scheduled or taken. In 2006, Weiss filed a notice regarding appellee Arthur Courshon's death and a motion to substitute his personal representative as defendant. That motion was set for hearing in May 2006, but the scheduled hearing was adjourned and Weiss never reset it.

The circuit court docket indicates that a notice of dismissal for lack of prosecution was issued on October 25, 2007, with good cause to be shown before a January 25, 2008 hearing at 9:00 a.m. On January 16, 2008, Weiss overnight-mailed to the trial judge a letter stating that she was concerned that there was "the possibility of an order of dismissal for lack of prosecution being issued," that she had not received a notice to that effect, and that an unnamed attorney "checked the case file for the actual order or notice, but it was not in the file."[3] Her letter then argued that her case should not be dismissed because Arthur Courshon had passed away, his probate case had been transferred from the circuit court in Broward County to Miami-Dade County, and Weiss was "constitutionally entitled to direct personal notification of the last day by which to file a claim (concerning this

---

[3] Weiss's letter was docketed January 17, 2008. Weiss filed in this appeal a second motion to supplement the record, which we grant, to include her letter to the trial judge, a court reporter's letter, and another copy of the docket. Weiss also filed in this Court an affidavit from the attorney who reviewed the circuit court file as described in her letter. That attorney apparently never appeared at the January 25 hearing, and his affidavit was not submitted to the trial judge.

suit) in the probate matter." Importantly, her arguments against dismissal for lack of prosecution concluded with a representation to the trial judge that if the hearing on the motion "is not *sua sponte* postponed or adjourned, I shall telephone Your Honor's Chambers at 9:00 a.m. on January 25th to be heard telephonically."

The trial court order dismissing Weiss's case is a form which includes a recitation that "no party opposing the motion to dismiss for lack of prosecution appeared as ordered and demonstrated the existence of the requisite record activity or that action had been stayed." The trial judge made an additional handwritten notation, "called at 9:25 to (631) 725-4486[4] no answer left msg [sic]—dismissing case," which he initialed.

Following the entry of the order of dismissal, Weiss filed no motion for rehearing, no affidavit, and no other showing in the trial court intended to demonstrate good cause for the absence of record activity or to substantiate her claim that the notice to show cause never reached her. Weiss does not assert, under oath or otherwise, that she called the trial judge as she had represented she would. In this appeal, she provides a court reporter's unsworn letter regarding the court reporter's discussion with the trial judge's judicial assistant and indicating that Weiss's matter had not been called by 9:20 a.m. when the court reporter left.

---

[4] This was the telephone number shown for Weiss at the top of her January 16, 2008, letter to the trial judge.

We review the trial court's determinations regarding the state of the record (whether the court's form notice was mailed) and any purported showing of "good cause" under the abuse of discretion standard. Swait v. Swait, 958 So. 2d 552, 553 (Fla, 4th DCA 2007). Once the periods of inactivity and conditions precedent in Florida Rule of Civil Procedure 1.420(e) have been established, the burden shifts to the non-moving party to show why the case should not be dismissed. Sebree v. Schantz, Schatzman, Aaronson & Perlman, 963 So. 2d 842, 846 (Fla. 3d DCA 2007) (citing Patton v. Kera Tech, Inc., 946 So. 2d 983, 986 (Fla. 2006)). "[U]nsworn allegations or arguments of counsel, standing alone, will not satisfy the plaintiff's burden...." Sebree, 963 So. 2d at 846.

Neither the record below nor the briefs submitted here establish any explanation, much less "good cause," for the absence of record activity and Weiss's lack of diligence. Weiss's letter to the trial judge acknowledges both the prospect of dismissal (in the absence of a sufficient showing of good cause) and the hearing on January 25. There is no indication that she called in as she had represented she would. The trial court noted that he attempted to call Weiss but she did not answer, so he left a message that he was dismissing the case.

Weiss's intemperate briefs in this case, as in prior cases, urge us to believe her and not the record. She expects this Court to believe, for example, that the circuit court clerk's office docketed a non-existent notice to show cause why the case should not be

dismissed for failure to prosecute; that only the online docket, and not the notice itself, alerted her to correspond with the court (over a week before the hearing) and send a local attorney to review the court file for a docketed notice that was not in the file; that opposing counsel somehow tricked the trial judge's judicial assistant and a court reporter on the morning of the scheduled hearing; that a highly-respected trial judge made an incorrect notation on the order of dismissal regarding a telephone call to a number that Weiss supplied; and that, given another decade or so, Weiss might ultimately come to Florida to prosecute her inflammatory complaint launched so many years ago. Suffice it to say that none of these suggestions is grounded in the record.

As Judge Winifred Sharp noted several years ago in another case involving a "frequent applicant" to her court: " This case reminds me of my grandmother's final warning and admonition to me and my siblings as children, when we had exhausted her patience with our doings. 'Enough is enough,' she would say. And that was the end of it."[5]

Affirmed.

---

[5] Isley v. State, 652 So. 2d 409, 410 (Fla. 5th DCA 1995).

United States Constitution

Amendment V

No person shall be ... deprived of life, liberty, or property without due process of law;....

Amendment XIV

Section 1. all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Rule of Civil Procedure 1.420 (e)

(e) Failure to Prosecute

In all actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred. If no such record activity has occurred within the 10 months immediately preceding the service of such notice, and no record activity occurs within the 60 days immediately following the service of such notice, and if no stay was issued or approved prior to the expiration of such 60 day period, the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.